## Kathryn Ma Wai Fong v TMC Importer & Exporter Sdn Bhd

HIGH COURT (SIBU) — COMPANIES (WINDING-UP) NO SBW-28PW-23/9 OF 2018
LIM HOCK LENG JC
20 FEBRUARY 2019

*Companies and Corporations — Winding up — Stay of order — Company wound up — Respondent appealed against winding up order — Respondent applied to stay winding up order — Whether winding up order could be stayed — Whether stay of winding up order caused detriment to commercial morality or irregularities — Companies Act 2016 s 465 (1)(h)*

The respondent was ordered to be wound up on the just and equitable ground pursuant to s 465(1)(h) of the Companies Act 2016 and the respondent had appealed against the said order. Pending the disposal of the appeal, the respondent as well as its contributories applied to stay the winding up order and all proceedings in relation thereto and the respondent submitted that it was a commercially solvent investment holding company with three wholly owned subsidiaries including one Sing Chew Coldstorage Sdn Bhd, for which it had executed two corporate guarantees for credit facilities amounting to RM30m. The said guarantees would be called upon and the respondent's reputation, goodwill and credit standing would be irreparably damaged if it were deprived of a stay. Its appeal, if successful, would consequently rendered nugatory. The respondent argued that substantial liquidation costs would be unnecessarily incurred if a stay was not granted pending the disposal of its appeal.

**Held**, allowing the respondent's application:

(1) There was nothing in the order for the respondent to do or carry out to avoid winding up. As such, a stay ought to be granted, otherwise the creditworthiness, goodwill and standing of the respondent would be irreversibly affected and the said guarantees called upon. There were also third parties who would be affected including the 126 employees of the subsidiary Sing Chew Coldstorage Sdn Bhd and their families. Further, the stay application of WTK Realty Sdn Bhd which had been ordered wound up on the identical grounds held just and equitable, was allowed by the Court of Appeal after it was dismissed by the High Court. The winding up order was not granted on findings of misfeasance or corporate shenanigans which would require the liquidator to immediately start work, more so as the petitioner had not commenced winding up proceedings with promptitude or shown that it would be prejudiced in any manner if a stay were granted (see paras 29–32).

(2) There was no detriment to commercial morality or any evidence of misfeasance or irregularities demanding investigations applicable to an interim stay since the respondent was wound up on the basis of an irretrievable breakdown in mutual trust and confidence between the two feuding factions. A stay of the winding up order which would preserve the integrity of the appeal could hardly be detrimental to commercial morality and to the interests of the public at large. The respondent had made out a positive or sufficient case for an interim stay pending disposing of its appeal. As there were special circumstances applicable to the interim stay application, the order to wind up the respondent dated 30 August 2018 and all proceedings in relation thereto was stayed pending disposal of the appeal of the respondent (see paras 46–48).

**[Bahasa Malaysia summary**

Responden telah diperintahkan untuk digulungkan di atas alasan yang adil dan saksama menurut s 465(1)(h) Akta Syarikat 2016 dan responden telah merayu terhadap perintah tersebut. Sementara menunggu keputusan rayuan, responden serta penyumbangnya membuat permohonan untuk suatu penangguhan perintah penggulungan dan semua prosiding berkaitan dengannya dan responden berhujah bahawa ia adalah syarikat induk pelaburan komersil yang solven dan mempunyai tiga syarikat subsidiari milik penuh termasuk Sing Chew Coldstorage Sdn Bhd, yang telah melaksanakan dua jaminan korporat untuk kemudahan kredit berjumlah RM30 juta. Jaminan tersebut akan ditarik balik dan reputasi responden, nama baik dan kedudukan kewangan akan rosak sekiranya penangguhan tersebut tidak dibenarkan. Rayuannya, sekiranya dibenarkan, akan menyebabkan ia menjadinya sia-sia. Responden berhujah bahawa kos penggulungan yang tidak perlu yang banyak akan ditanggung jika penangguhan sementara menunggu keputusan rayuan tidak dibenarkan.

**Diputuskan**, membenarkan permohonan responden:

(1) Tidak ada apa-apa dalam perintah bagi membolehkan responden untuk dilakukan atau dijalankan untuk mengelakkan penggulungan. Justeru itu, suatu penangguhan sepatutnya diberikan, jika tidak, kelayakan kredit, nama baik dan kedudukan responden akan terjejas dan jaminan tersebut ditarikbalik. Terdapat juga pihak ketiga yang akan terlibat termasuk 126 pekerja anak syarikat Sing Chew Coldstorage Sdn Bhd dan keluarga mereka. Selain itu, permohonan penangguhan oleh WTK Realty Sdn Bhd yang telah diperintahkan untuk digulungkan atas alasan yang sama adalah adil dan saksama, dibenarkan oleh Mahkamah Rayuan selepas ditolak oleh Mahkamah Tinggi. Perintah penggulungan tidak dibenarkan terhadap penemuan kesilapan atau penipuan korporat yang memerlukan pelikuidasi untuk segera memulakan kerja, lebih-lebih lagi jika pempetisyen tidak memulakan penggulungan dengan pantas atau

menunjukkan bahawa ianya akan memprejudiskan dalam apa-apa cara jika penangguhan telah diberikan (lihat perenggan 29–32).

(2) Tidak ada yang menjejaskan moral komersial atau apa-apa keterangan yang salah atau penyelewengan yang menuntut penyiasatan yang terpakai bagi penangguhan interim memandangkan responden digulungkan atas dasar pertikaian dalam kepercayaan dan keyakinan antara kedua-dua pihak yang bertentangan. Penangguhan perintah penggulungan yang akan memelihara integriti rayuan itu tidak dapat menjejaskan moral komersial dan kepentingan awam secara umum. Responden telah memberikan kes yang positif atau mencukupi untuk penangguhan interim sementara menunggu pelupusan rayuannya. Memandangkan terdapat keadaan khas yang terpakai bagi permohonan penangguhan sementara interim, perintah penggulangan responden bertarikh 30 Ogos 2018 dan kesemua prosiding berhubung dengannya telah ditangguhkan sementara menunggu rayuan responden dilupuskan (lihat perenggan 46–48).]

**Notes**

For cases on stay of order, see 3(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2067–2085.

**Cases referred to**

*A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley and others, Re* [1975] 1 All ER 1017, Ch D (refd)

*Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd* [2016] 11 MLJ 590, HC (refd)

*Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] MLJU 401; [2018] 1 LNS 427, CA (refd)

*Besteel Berhad v Pembangunan Ladang Hassan Sdn Bhd* [2010] 1 LNS 1214, HC (refd)

*Bond M & E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)* [2017] MLJU 376, HC (refd)

*Chan Hak Foon v Sutera Harbour Resort Sdn Bhd & Sutera Harbour Golf and Country Club Berhad* [2009] MLJU 423; [2009] 9 CLJ 109, HC (refd)

*Dato' Francis Ng Tian Sang v Alexander Wong Shoon Choy & Ors* [2002] MLJU 219; [2002] 7 CLJ 301, HC (refd)

*Equiticorp Holdings Ltd v United Securities Sdn Bhd* [2007] MLJU 890; [2007] 6 CLJ 268, CA (refd)

*Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377; [1987] 2 CLJ 227 (refd)

*In the matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204 (refd)

*Kathryn Ma Wai Fong v Trillion Investment Pty Ltd* [2018] SGHC 88 (refd)

*Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

A *Low Nam Hui & Sons Sdn Bhd v Huang Yan Teo* [2007] 7 MLJ 13; [2007] 6 CLJ 27, CA (refd)
*Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)
*S Zhong Shan International Investments Co Ltd, Re* [1989] 2 HKC 173, CA
B (refd)
*Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581, CA (refd)
*Taman Rimba (Mentakab) Sdn Bhd v Warrior Rubber Products (M) Sdn Bhd; Cindee Development Sdn Bhd & Anor (Contributories)* [2018] 9 CLJ 407
C (refd)
*UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (refd)
*Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709, FC (refd)
D *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications* [1994] 3 MLJ 89; [1995] 1 CLJ 250, HC (refd)

**Legislation referred to**

E Companies (Winding-Up) Rules 1972 r 7
Companies Act 1948 [UK] s 222(f)
Companies Act 2016 ss 243, 465(1)(h), 492, 506
Construction Industry Payment and Adjudication Act 2012
Courts of Judicature Act 1964 s 73
F Rules of Court of Appeal 1994 r 13

*Alvin Yong (Shirleen Ong with him) (Alvin Yong) for the petitioner.*
*Sim Hui Chuang (Reddi & Co) for the respondent.*
*Stanley Eddy (Battenberg & Talma) for the contributories.*

G **Lim Hock Leng JC:**

**[1]** On 30 August 2018, the respondent was ordered to be wound up on the 'just and equitable' ground, pursuant to s 465(1)(h) of the Companies Act
H 2016.

**[2]** The respondent and its contributories have appealed against the winding up order.

I **[3]** The respondent as well as its contributories have applied to stay the winding up order and all proceedings in relation thereto, pending disposal of their respective appeals to the Court of Appeal.

**[4]** In support of its application for a stay, the respondent averred that it is

a commercially solvent investment holding company with three wholly owned subsidiaries including one Sing Chew Coldstorage Sdn Bhd, for which it had executed two corporate guarantees for credit facilities amounting to RM30m. The said guarantees would be called upon and the respondent's reputation, goodwill and credit standing would be irreparably damaged if it were to be deprived of a stay. Its appeal, if successful, would consequently be rendered nugatory.

**[5]** To a great extent, the arguments advanced by the contributories overlap with those of the respondent. The respondent also argued that substantial liquidation costs would be unnecessarily incurred if a stay is not granted pending the disposal of its appeal (especially since there is a cross-appeal by the petitioner as to the appointment of the liquidator Wong Ching Yong), apart from pointing out that a stay would also be beneficial to the petitioner if the respondent is not wound-up but continues to be profitable.

**[6]** The petitioner's contention that these arguments, particularly the arguments that the respondent is an ongoing profitable business, had already been ventilated and decided upon, is misconceived. The legal considerations which apply to an application for winding up on the just and equitable ground are very different from those which apply to an application for a stay of the winding up order.

**[7]** In arguing for what learned counsel for the petitioner termed as the restrictive approach by the courts in determining a stay application in respect of a winding up order, much reliance was placed on *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley and others* [1975] 1 All ER 1017.

**[8]** Reference was also made to *In the matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204, a decision of the High Court in Kuala Lumpur and *Re S Zhong Shan International Investments Co Ltd* [1989] 2 HKC 173, a decision of the Hong Kong Court of Appeal. Both courts relied on the *Re A & BC Chewing Gum Ltd* case.

**[9]** As such, the salient facts of *Re A & BC Chewing Gum Ltd* as the primary case, require to be narrated, to give context to the reasoning therein.

**[10]** In that case, in 1967, the petitioners who were in the chewing gum business purchased one-third of the shareholding in the respondent company which was also in the chewing gum business on the basis that, although they would be minority shareholders, they would have equal control with the individual respondents, Douglas Coakley and Anthony Coakley, who were brothers and directors of the respondent company. To achieve equality of control, a new set of articles was adopted which entitled the petitioners to

appoint or remove a director to represent them and provided that board decisions had to be unanimous. The petitioners, the individual respondents and the respondent company then executed a shareholders' agreement to like effect.

**[11]** The share capital was reorganised so that the petitioners held 'A' shares and the Coakley brothers held 'B' shares.

**[12]** By 1970, the respondent company was experiencing financial difficulties. There were various meetings to discuss the situation but the management and control arrangement was not altered.

**[13]** In March 1971, the petitioners appointed Douglas Coakley as their 'A' director to represent them. The situation did not improve and Douglas Coakley was removed as 'A' director in March 1973, to be replaced by one John Sullivan.

**[14]** The Coakley brothers refused to recognise the removal of Douglas Coakley as well as the appointment of John Sullivan as the replacement director. They allege that the parties had on 3 March 1971 agreed to abrogate the petitioners' right to remove a director and appoint a new one in his place, and that they had the right to manage the company to the exclusion of any directors appointed by the petitioners.

**[15]** The petitioners as contributories then initiated proceedings to wind up the respondent company on the just and equitable ground, pursuant to s 222(f) of the Companies Act 1948. An action was also brought for a declaration relating to the funds of the company being used to defend or oppose the petition, and consequential reliefs.

**[16]** The respondent company was ordered to be wound up and the respondent directors were ordered to pay costs, while the declaration was granted.

**[17]** In refusing to grant a stay, Plowman J held:

> As I understand it, the position is this. First of all, as a matter of jurisdiction, it is quite clear that I have jurisdiction to grant a stay because the Companies Act 1948 says so. It says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then, there is the question of practice and as a matter of practice, a stay is never granted. The only exception that I think is known to the Department of Trade is where I myself once went wrong in the *Westbourne Galleries* case, and not having been alerted to the position and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay and they are these: as

> soon as a winding up order has been made, the official receiver has to ascertain: first of all, the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of s 227 of the 1948 Act; and thirdly, the liabilities of the company at the date of the order so that he can find out who the preferential creditors are, and also the unsecured creditors.

**[18]** The winding up order by Plowman J was made after a hearing which lasted 23 days, including hearing accounts of what happened from all four persons who were present at the meeting on 3 March 1971 at the Savoy Hotel. By contrast, in the present case, the winding up order was summarily disposed of without a trial. Where there is summary disposal of a case, as here, it may be of some use to first examine some of the authorities on merits and special circumstances.

**[19]** In *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377; [1987] 2 CLJ 227, VC George J (as he then was) while accepting the general rule that a stay of execution pending appeal of a decision made after a full trial will only be granted where there are special circumstances, held that in cases decided by way of summary disposal, albeit with reference to decisions by registrars, 'a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal'.

**[20]** That decision did not find favour with Syed Ahmad Helmy JC (as he then was) in *Dato' Francis Ng Tian Sang v Alexander Wong Shoon Choy & Ors* [2002] MLJU 219; [2002] 7 CLJ 301 at p 305, where he held:

> There is no valid justification for such a distinction to be made. On the contrary the very fact that the judgment is summarily granted must by itself be justification enough of the overwhelming evidence that obviates the necessity of a full trial and hence it would be contrary to justice to deprive the successful litigant to savour the fruits of his judgment.

**[21]** While the Court of Appeal in *Low Nam Hui & Sons Sdn Bhd v Huang Yan Teo* [2007] 7 MLJ 13 at pp 17–18; [2007] 6 CLJ 27 at p 35, held that it was in agreement 'with the judgment of VC George J (as he then was) in *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 that in an application for stay, a distinction must be drawn between a case summarily decided and one decided after a full trial and enquiry', the decision was with reference to cases decided by the registrars summarily.

**[22]** There are other permutations which allude to a broader acceptance of the decision of VC George J (as he then was). In *Chan Hak Foon v Sutera Harbour Resort Sdn Bhd & Sutera Harbour Golf and Country Club*

*Berhad* [2009] MLJU 423; [2009] 9 CLJ 109, a judgment in default was obtained in Hong Kong in respect of which David Wong J (as he then was) held:

> ... the merits of the claims had not been adjudicated yet. This factor in my view is a relevant consideration to whether there exists special circumstances. His Lordship, VC George J in *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 makes a very important qualification to the principle of special circumstances and this is what he said:
>
> > where a judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or it applies, further appeal) will not be granted unless there are special circumstances
>
> [16] His Lordship Ian Chin J also makes the same observation in *Yun Hing (Sabah) Sdn Bhd v Sandakan Plywood & Veneers Co Sdn Bhd*:
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> > ... the most significant difference between *Monk v Bartram* and the present case is that in our case there was no trial at all while in that case there was a trial with a jury and this is a relevant factor ...
>
> [17] I have no reason to disagree with the two learned Lordships.

**[23]** The line between what constitutes the 'merits' of a case and what amounts to a special circumstance may be thin or blurred. It is arguable whether merits can be considered where the decision in the instant case is demonstrably per incuriam, as where an overruled authority has been relied upon by the court, or whether conflicting authorities on the same issue would constitute a special circumstance.

**[24]** By way of illustration, there are now several pending appeals before the Federal Court as to whether the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') applies retrospectively or prospectively, stemming from the Court of Appeal's decision in *Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] MLJU 401; [2018] 1 LNS 427 that the CIPAA is of prospective application, and the decision in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527 that the CIPAA is of retrospective application which was upheld by the Court of Appeal on 13 July 2015. See *Bond M & E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)* [2017] MLJU 376 at para 63. In such a scenario, a stay may be appropriate to await the apex court's decision (on the conflicting authorities which could be considered a special circumstance), although one could conceivably argue that the merits of the case are being regurgitated.

**[25]** While this court had distinguished the decision of the Singapore High

Court in *Kathryn Ma Wai Fong v Trillion Investment Pty Ltd* [2018] SGHC 88 on what the contributories had argued, in opposing the winding up petition, were similar salient facts, it is mindful, for the avoidance of doubt, that it is not to revisit the merits of the case but to consider only such special circumstances as there are.

**[26]** Clearly, special circumstances are not circumscribed by categorisation. The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 at p 266; [2003] 4 CLJ 1 at p 14, held:

> As Ian Chin JC (as he then was) said in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 at p 521:
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> > An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
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> > > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
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> > The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

**[27]** Importantly, the winding up order here is not based on a monetary judgment, as was the case in *Re S Zhong Shan International Investments Co Ltd* [1989] 2 HKC 173, an authority relied upon by the petitioner. In that case, as in other cases involving monetary judgments, all the debtor company needs to do, to avert winding up, is to settle the amount due. It is not disputed that the respondent is commercially solvent and able to pay its debts.

**[28]** The Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 at p 407, held that '(t)he grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt'.

**[29]** In the case at hand, however, there is nothing in the order for the respondent to do or carry out to avoid winding up.

**[30]** As such, a stay ought to be granted, otherwise the creditworthiness, goodwill and standing of the respondent would be irreversibly affected, and the said guarantees called upon. There are also third parties who would be affected, including the 126 employees of the subsidiary Sing Chew Coldstorage Sdn Bhd and their families.

**[31]** Further, the stay application of WTK Realty Sdn Bhd (the flagship company of the WTK Group of Companies) which had been ordered to be wound up on identical grounds held to be just and equitable, was allowed by the Court of Appeal after it was dismissed by the High Court.

**[32]** Furthermore, the winding up order here was not granted on findings of misfeasance or corporate shenanigans which would require the liquidator to immediately start work, more so as the petitioner had not commenced winding up proceedings with promptitude or shown that it would be prejudiced in any manner if a stay were to be granted.

**[33]** In *Taman Rimba (Mentakab) Sdn Bhd v Warrior Rubber Products (M) Sdn Bhd; Cindee Development Sdn Bhd & Anor (Contributories)* [2018] 9 CLJ 407 at p 424, Mohd Nazlan Ghazali J held:

> [59] I do not think much prejudice if any, would be occasioned to the petitioner as a result, for the stay to be granted is only to operate for a specified and limited time, which, specifically is until the disposal of the appeals against the dismissal of the striking out of the petition and the granting of the winding up order of the respondent at the Court of Appeal. In fact, neither did the petitioner show in what fashion the stay would cause any prejudice to the petitioner.

**[34]** Judicial notice may be taken of the disposal rate of the Court of Appeal and the petitioner through its solicitors is at liberty to seek an early hearing date. See *Besteel Berhad v Pembangunan Ladang Hassan Sdn Bhd* [2010] 1 LNS 1214.

**[35]** Before distinguishing the other main authorities cited by learned counsel for the petitioner, viz, *In the Matter of Tahansan Sdn Bhd*, *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications* [1994] 3 MLJ 89; [1995] 1 CLJ 250 and *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709, it is necessary to pause to refer to *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 where the Court of Appeal held:

> Exercises of judicial discretion are not judicial precedent because they are only

authority for the facts of the particular case. A

**[36]** In the *Woodsville* case, although a stay of the winding up on just and equitable ground was not granted, it is to be noted that the second to fifth respondents were 'not opposed to the idea of the winding up the first respondent' but they preferred a voluntary winding up as opposed to a compulsory winding up. The company was destined to be wound up one way or another. It was held that 'the respondents had failed to provide me with sufficient proof under s 243 of the Act that the winding up ought to be stayed'. B

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**[37]** As for *In the Matter of Tahansan Sdn Bhd*, the learned judge did not give any reason for his adoption of Plowman J's decision in *Re A & BC Chewing Gum Ltd*. There, unlike here, it was held that although the respondents had a legal right to oust the petitioner from his directorship for which he was remunerated, 'they could only do so subject to the petitioner's right to obtain equitable relief in the form of a winding up order'. On any view, a court's discretion, which Plowman J declined to exercise, depends on the facts of each case and there are special circumstances, as set out herein, which justify the grant of a stay pending disposal of the appeals against the winding up order. D

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**[38]** Turning now to *Vijayalakshmi Devi Nadchatiram*, the application was for a stay of a winding up order on a permanent basis. It was premised on s 243 of the Companies Act 1965.

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**[39]** On the other hand, the respondent company and the contributories here rely on s 506 of the Companies Act 2016, r 7 of the Companies (Winding-Up) Rules 1972, s 73 of the Courts of Judicature Act 1964.

**[40]** As is clear from *Ambank (M) Bhd v Malaysian Coal & Minerals Corp Sdn Bhd* [2016] 11 MLJ 590, s 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of Court of Appeal 1994 confer jurisdiction and discretion on the winding up court to stay a winding up order. G

**[41]** In addition, the contributories rely on s 492 of the Companies Act 2016 governing interim stays. It provides: H

> (1) At any time after an order for winding up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up of the company ought to be stayed, make an order staying the winding up of the company for a specified time on such terms and conditions as the Court thinks fit. I

(2) Where the Court makes an order under subsection (1), the liquidator shall cease to conduct any further action on behalf of the company from the date of such order.

**[42]** There is undoubtedly a distinction between the legal considerations governing a permanent stay application under s 243 such as that in *Vijayalakshmi Devi Nadchatiram* and those governing an interim stay application under s 73 of the Courts of Judicature Act 1964 or pursuant to the inherent jurisdiction of the court.

**[43]** In *Equiticorp Holdings Ltd v United Securities Sdn Bhd* [2007] MLJU 890; [2007] 6 CLJ 268 at p 277, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal held:

> [7] As may be seen from the authorities discussed in *Vijayalakshmi Devi v Dr Mahadevan*, s 243(1) has nothing whatsoever to do with staying the effects of a winding up order pending an appeal challenging the making of that order. The latter is governed by s 73 of the Courts of Judicature Act 1964. There is also inherent jurisdiction in a High Court to stay the effects of its orders pending appeal. See, *Re Wickham* [1887] 35 Ch D 272; *Fitzholmes v Waryam AIR* [1923] Lahore 514. Indeed, it is a logical step in the appellate process that if a party has a right of appeal conferred upon it then it has the right to seek and obtain a stay of the order appealed against: The remarks of the Supreme Court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* certainly lend support for that view. Further, in *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661, Abu Mansor JCA (later FCJ) considered it to be 'trite law that a court which has given judgment certainly has the power to order stay'.

**[44]** The distinction between a permanent stay application under s 243 of the Companies Act 1965 and an interim stay under s 492 of the Companies Act 2016 was explained by Mohd Nazlan Ghazali J in *Taman Rimba (Mentakab) Sdn Bhd*:

> ... the principles otherwise adopted in considering a permanent stay application against a winding up order ought not to be applied with equal force in requests for stay other than on a permanent basis.
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> [33] Thus, it is unnecessary for instance for the court to insist on, in every stay application, for the liquidator's report to be produced to show evidence of likelihood of commercial solvency, which as decided in *Ga-Seng* would be some of the essential prerequisites (in a permanent stay situation). In my view, the discretion of the court in evaluating the merits of a stay application otherwise than for a permanent basis ought to be guided by the test of the applicant for stay showing the existence of special circumstances as elaborated in *Kosma Palm Oil Mill* (see further below).
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> [34] In the instant application before me, the contributories are asking only for a stay pending the disposal of the appeal against my decisions ordering the winding

up of the respondent and the dismissal of the strike out application of the petition by the contributories. They are not asking for a permanent stay.

[35] And the law has also seen some changes in this exact respect. The concept of permanent stay has, since the coming into force of the Companies Act 2016 ('the CA 2016') been replaced with termination of winding up under s 493 of the CA 2016. A stay designed for a limited period is now found in s 492.

**[45]** The requirements as laid down by the Federal Court in *Vijayalakshmi Devi Nadchatiram* are:

(a) the grant of a stay under s 243 is discretionary and the applicant must make out a positive or sufficient case;

(b) the attitude of the creditors and liquidator and the interests of the creditors are to be taken into account;

(c) whether it is conducive or detrimental to commercial morality and interests of the public at large; and

(d) a stay will be refused if there is evidence is misfeasance or irregularities demanding investigation.

**[46]** Even if these requirements were applicable to an interim stay, there is no detriment to commercial morality, or any evidence of misfeasance or irregularities demanding investigation since the respondent was wound up on the basis of an irretrievable breakdown in mutual trust and confidence between the two feuding factions. A stay of the winding up order which would preserve the integrity of the appeal can hardly be said to be detrimental to commercial morality and to the interests of the public at large.

**[47]** The respondent has made out a positive or sufficient case for an interim stay pending disposal of its appeal.

**[48]** As there are special circumstances applicable to the interim stay application here, the order to wind up the respondent dated 30 August 2018 and all proceedings in relation thereto is stayed pending disposal of the appeal of respondent. The validation order is extended to the date of final disposal of the appeal, upon an oral application, and the costs of this motion is to be paid out of the respondent's assets.

*The respondent's application allowed.*

Reported by Mohd Kamarul Anwar